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No. 85-429

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

EXXON CORPORATION,
Petitioner,
v.
UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Chamber of Commerce of the United States ("Chamber") moves for leave to file the attached brief *amicus curiae* in this case pursuant to Supreme Court Rule 36.1. This brief is filed in support of Petitioner Exxon Corporation ("Exxon"), with the written consent of Exxon and several of the numerous Respondents in this case, including the United States.[1] This motion

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[1] Consent letters from Exxon, the Solicitor General, the State of Minnesota, Champlin Petroleum Company, Tosco Company, Tenneco Oil Company, Pennzoil Company, Marathon Petroleum Company, U.S. Oil & Refining Company, Mobil Oil Corporation, Murphy Oil Corporation and Ashland Oil, Inc. are being filed with the Clerk of the Court.

is necessary because Respondent States Arkansas, Delaware, Iowa, Kansas, North Dakota, Rhode Island, Utah, West Virginia and Louisiana have refused to consent to the filing of this brief, and efforts to obtain the consent of the remaining Respondents were unsuccessful.

The Chamber is the largest federation of business organizations and individuals in the United States, with a current membership exceeding 180,000 corporations, partnerships and proprietorships, as well as several thousand trade associations and local and state chambers of commerce. The Chamber regularly advocates its members' views in litigation of issues of national concern to the American business community, and in fact filed a brief *amicus curiae* in support of the Petitioner in the proceeding below. This case involves questions about the imposition of retroactive liability and the appropriate standards for judicial review of agency action. These issues present to this Court critical questions of constitutional and administrative law that have far-reaching consequences for the business community at large.

The Chamber opposes the concept of retroactive law enforcement, and has participated in several other cases advocating the reversal of government actions with retroactive effect.[2] In these cases, the Chamber has consistently stressed the importance of unambiguous regulations which conform with the legislative intent of the enabling statute. In order to comply with regulatory programs, businesses need to know on a timely basis

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[2] *See, e.g., Airwork Service Division* v. *Director, Division of Taxation*, 97 N.J. 290, 478 A.2d 729 (1985), *cert. denied*, 53 U.S.L.W. 3838 (U.S. May 28, 1985) (No. 84-1506) (challenge to the retroactive assessment of state sales taxes); *Pension Benefit Guaranty Corporation* v. *R. A. Gray & Co.*, 104 S. Ct. 2709 (1984) (challenge to the retroactive application of the Multiemployer Pension Plan Amendments Act of 1980).

what conduct is permitted and proscribed by the regulations applicable to their operations. This is particularly important when vague, equivocal and highly technical regulations give rise to severe retroactive liability, as in the case below, which resulted in the largest monetary judgment in the history of American jurisprudence.

In keeping with traditional notions of fundamental fairness, government agencies have an obligation to notify businesses of what the law is *before* that law is enforced against them. In the instant case, the Department of Energy ("DOE"), successor to the Federal Energy Administration ("FEA"), failed to meet this obligation when it applied portions of newly reinterpreted price control regulations retroactively for 20 months prior to their effective date. Accordingly, the agency held Exxon liable for conduct which was permissible under its own earlier interpretations. Such retroactive application of reinterpreted agency regulations offends constitutional principles of due process, and must be reversed. For this reason alone, the Court should grant Exxon's petition for certiorari.

The Chamber is also concerned about the amount of judicial deference accorded to agency action by the Temporary Emergency Court of Appeals ("TECA"). This Court has reviewed only two TECA decisions [3] and has never reviewed a TECA decision involving the private rights or obligations of the petroleum industry under allocation and price control regulations. Infrequent Supreme Court review of TECA decisions may result in what has been described as an "institutional bias in favor of agency policy," a trend that has been of growing concern to the petroleum industry and to businesses in general. Impartial judicial review of agency action is a fundamental principle of administrative law, essential

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[3] *See Fry* v. *United States*, 421 U.S. 542 (1975) (application of federal wage control to state employees); *Tully* v. *Mobil Oil Corp.*, 455 U.S. 245 (1982) (validity of state tax on gasoline).

to ensuring that procedural safeguards are observed. Intervention by this Court will ensure that TECA functions under the same standards of judicial deference governing other courts.

As the principal voice of the American business community, the Chamber is well suited to present the broad interest of business in this case. The Chamber believes it is important for this Court to recognize the significance of these issues to the business community and, therefore, respectfully requests leave to file the attached brief.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION

STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States ("Chamber") respectfully refers this Court to its Motion for Leave to File Brief *Amicus Curiae* for a statement of its interests in this proceeding.

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[1] The Chamber believes that the facts of this case have been sufficiently set forth in the Petition for Writ of Certiorari. Rather than burdening the Court with a full restatement, the Chamber adopts Exxon's Statement.

ARGUMENT

I. RETROACTIVE APPLICATION OF NEW AGENCY INTERPRETATIONS OF AMBIGUOUS REGULATIONS VIOLATES DUE PROCESS.

While it is unquestionably the duty of American businesses to comply with the law, it is the duty of the government to make clear what the law is, in advance, so that companies can comply with it. *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). Unambiguous regulations are especially important when they concern expensive business decisions, as in the case below, which involved methods for accounting oil production at the Hawkins Oil Field. As detailed in Petitioner's Statement, the Federal Energy Administration ("FEA") created a crazy quilt of administrative regulations which utterly failed to make its price control requirements clear, and now the Department of Energy ("DOE"), FEA's successor, seeks to make Exxon bear the burden of that failure by holding the company liable for the largest monetary judgment in American history. The fundamental unfairness of this result is striking, and the intervention of this Court is needed to protect the company's constitutional right to due process of law.

From the beginning, Exxon's due process rights were violated by the sheer ambiguity of the petroleum price control regulations at issue. Vague and ambiguous laws violate fundamental rights. *Grayned* v. *City of Rockford*, 408 U.S. at 108. Laws must give a person of ordinary intelligence a reasonable opportunity to know what the law is so he may direct his actions and conduct accordingly. *Id.* "Vague laws," reasoned this Court, "may trap the innocent by not providing fair warning." *Id.* In addition, clear standards deter arbitrary and discriminatory enforcement of rules and regulations. *Id.*

The Temporary Emergency Court of Appeals ("TECA") itself has stressed the importance of clear agency interpretation of regulations:

> Fundamental fairness requires that the regulations be clear so that men of common intelligence need not guess at the meaning and differ as to the application. One can have knowledge of a legal duty imposed by regulations only when there is adequate notice.

Tenneco Oil Co. v. *FEA*, 613 F.2d 298, 303 (Temp. Em. Ct. App. 1979). It concluded that "[a] court cannot put its imprimatur on a regulation that was intended but never enacted." *Id.*[2]

The regulations in question here, promulgated pursuant to the Emergency Petroleum Allocation Act of 1975, *as amended*, 15 U.S.C. §§ 751-56 (1983), are highly technical and equivocal.[3] Their ambiguities were worsened by the agency's indecision and vacillation about the subject matter to which its own regulations applied.[4] Any industry requests for administrative interpretations were not answered in a timely manner.[5] A Senate Subcommittee examining the issue of regulatory clarity in this context concluded:

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[2] *See also, Kent Nowlin Construction Co.* v. *OSHRC*, 593 F.2d 368, 371 (10th Cir. 1979) (persons "should not be penalized for deviation from a standard the interpretation of which, in relationship with kindred standards, cannot be agreed upon by those who are responsible for compelling compliance with it and with oversight of the procedure for its enforcement").

[3] *See supra* note 17 and accompanying text.

[4] *See supra* note 17 and accompanying text.

[5] One commentator has noted that the greatest source of petroleum regulatory problems has been the absence of authoritative, timely guidance as to the precise meaning of the price and allocation regulations. Mode, *Federal Petroleum Regulation in the Courts*, 29th Annual Institute on Oil and Gas Law 39, 93 (1978) ("It is generally conceded by those who have studied the regulatory history that the failure to provide adequate and timely interpretations of these rules has created major difficulties for the industry and for the agency's own compliance program.").

> FEA's failure to have adequate guidelines [and] regulations . . . has resulted in many respects in a lack of *fairness* to firms in the regulated industry and to consumers . . . Moreover, firms are often subject to varying interpretations resulting in different applications of regulations . . .[6]

If agency officials cannot determine what their own rules mean, private citizens and businesses cannot be expected to do so.

Clear interpretation of the regulations governing businesses is necessary to give companies proper notice of required conduct.[7] This need is particularly acute with respect to interpretations of price control regulations which govern businesses that invest substantial amounts of time and money in research and development. In order to expend corporate resources appropriately, businesses must be able to readily and confidently ascertain regulatory intent.

Apart from the ambiguity and vagueness of the regulations, Exxon's due process rights were further violated when DOE retroactively applied FEA's reinterpretation of them. Due process prohibits retroactive application when the interests of those affected outweigh the need for retroactivity. *SEC* v. *Chenery Corporation*, 332 U.S. 194, 203 (1947). This Court has held that the need for retroactivity is outweighed when it would (1) "unduly intrude upon reasonable reliance interests,"[8] (2) impose a liability which affected persons could not reason-

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[6] Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 94th Cong., 1st Sess., *The Federal Energy Administration: Enforcement of Petroleum Price Regulations*, 38 (Comm. Print 1975) (emphasis in original).

[7] *FTC* v. *Atlantic Richfield Company*, 567 F.2d 96, 103 (D.C. Cir. 1977).

[8] *Heckler* v. *Community Health Services*, 104 S. Ct. 2218, 2224 n. 12 (1984).

ably have anticipated,[9] or (3) interfere with antecedent rights, unless the import of the regulatory terms and the manifest intention of the legislature unequivocally indicate otherwise.[10]

In the instant case, the intent of the legislature in enacting the Emergency Petroleum Allocation Act of 1975 is implicit—to promote production of domestic oil in order to reduce America's dependence on foreign oil.[11] But rather than promote domestic oil production, DOE's retroactive application of the price control regulations penalized Exxon for its enhancement efforts at the Hawkins Oil Field. Exxon could not have anticipated retroactive imposition of liability. And in contravention of its earlier interpretation of the regulations, DOE's action abrogated Exxon's rights to use beneficial accounting methods, and denied Exxon an opportunity to establish that its accounting methods were proper. In so doing DOE disregarded this Court's holding that "regulations validly prescribed by a government administrator are binding upon him as well as the citizen." *Service* v. *Dulles*, 354 U.S. 363, 372 (1957). To hold Exxon liable under these circumstances grievously violates its due process rights.

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[9] *See e.g., Central Illinois Public Service Company* v. *U.S.*, 425 U.S. 21, 32 (1978) ("[n]o employer in viewing the regulation could reasonably suspect that a withholding obligation existed," and it was "hardly reasonable to require the employer to fill the gap on its own account"); *Lewellyn* v. *Frick*, 268 U.S. 238, 252 (1925) (a regulation cannot be applied retroactively "to impose an unexpected liability that if known might have induced those concerned to avoid it and use their money in other ways").

[10] *Green* v. *United States*, 376 U.S. 149, 160 (1964).

[11] Congress enacted the Emergency Petroleum Allocation Act of 1975 to deal with shortages of petroleum products caused by inadequate domestic production and the unavailability of imports sufficient to satisfy domestic demand. 15 U.S.C. § 751 (1983).

The Chamber strongly advocates business compliance with administrative regulations. A government agency, however, has a concomitant duty to clearly set forth the obligations of private parties. Where an agency has not done so, a court cannot uphold a retroactive reinterpretation of such regulations when it imposes severe penalties on persons who reasonably relied on earlier interpretations. Such retroactive lawmaking not only disrupts and discourages essential business decision-making, but also impedes the accomplishment of the national goals that the statutes and regulations were designed to further. The cure for unclear and ambiguous regulations is prospective clarification or new regulations, not penalties based upon newly announced retroactive standards. "If the regulation missed its mark, the fault lies in the working of the regulation—a matter easily remedied . . . with no need to press limits by judicial construction." [12]

II. THIS COURT'S INTERVENTION WILL INSURE IMPARTIAL JUDICIAL REVIEW OF ADMINISTRATIVE ACTIONS BY TECA.

The amount of deference TECA accorded DOE's action presents this Court with an independent reason for exercising its discretionary power of review. TECA's exclusive jurisdiction of petroleum price control regulations and this Court's infrequent review of TECA decisions have unduly insulated petroleum price control cases from the well-settled standards of judicial deference governing other federal courts. Review of this TECA decision by the Court would ensure fair and objective decision making, and quell the growing concern about TECA's tendency towards institutional bias.

Impartial review of agency actions is essential to the administration of justice. In *Volkswagenwerk* v. *Federal Maritime Commission*, 390 U.S. 261, 272 (1968), *modi-*

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[12] *Diamond Roofing Co.* v. *OSHRC*, 528 F.2d 645, 648-49 (5th Cir. 1976).

fied, 392 U.S. 901 (1968), this Court held that federal courts should not stand aside and blindly affirm administrative decisions that are inconsistent with statutory mandates or that frustrate the congressional policy underlying a statute. Judicial scrutiny is necessary to ensure that congressional intentions are carried out and that procedural safeguards are observed. *Bowels* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945).

Critical review of TECA decisions is particularly important in light of the criticism that DOE has repeatedly failed to comply with well established procedural requirements.[13] Representatives of parties litigating TECA cases have expressed concern that their clients have not received fair hearings before TECA.[14] A close observer of TECA has reported that it only rarely requires agency adherence to minimal procedural standards:

> A review of the decisions of the TECA supports the conclusion that the court has shown little concern for "principled fairness." The TECA has abdicated its judicial responsibility by its deference to administrative agencies, its failure to secure agency compliance with procedural safeguards and its unwillingness to closely scrutinize the series of emergency economic regulatory programs which were spawned during the 1970's.[15]

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[13] Burke, *Report to ABA Economic and Resources Controls Committee on Economic Stabilization Program Litigation*, 32 Bus. Law. 1259, 1271 (1977).

[14] *See* American Bar Association, Administrative Law Section, *Recommendations and Report to the House of Delegates, American Bar Association: Report on Appellate Review for Emergency Programs* 11 (1984).

[15] Elkins, *The Temporary Emergency Court of Appeals: A Study in the Abdication of Judicial Responsibility*, 1978 Duke L.J. 113, 151 (footnote omitted).

TECA may be overly deferential to DOE because of its frequent review of DOE's price control regulations.[16] That TECA may devine the regulatory intent does not automatically insure that the regulations actually have the requisite clarity to serve as a guide to corporate action. TECA itself has observed that "it is difficult, even for experts, to understand these complex regulations, as is evidenced by the frequent correction, modification, change and clarifying rulings . . ." [17]

In this case, without a trial on the merits, TECA summarily affirmed the agency's application of newly interpreted price control regulations even though, as described above, (1) such retroactive application offended the regulations' statutory purpose, (2) the agency repeatedly failed to adhere to its own regulations and (3) the record evidences that factual issues were in dispute. For these reasons, this Court should grant Exxon's Petition for Certiorari.

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[16] TECA has exclusive jurisdiction of all petroleum price control cases arising under the Emergency Petroleum Allocation Act of 1975, *as amended*, 12 U.S.C. § 1904 note (1980), and the Economic Stabilization Act of 1970, *as amended*, 15 U.S.C. §§ 751-56 (1983). Although both these Acts have now expired, petroleum price control cases continue to be litigated under them. The Economic Stabilization Act of 1970, *as amended*, expired in 1973. 12 U.S.C. § 213 (1980). And in 1981 the President by executive order cancelled the sections pertaining to petroleum price control in the Emergency Petroleum Allocation Act of 1975, *as amended*. Exec. Order No. 12287, 46 Fed. Reg. 9909 (1981).

[17] *Longview Refining Co.* v. *Shore*, 554 F.2d 1006, 1023 (Temp. Em. Ct. App. 1977), *cert. denied*, 434 U.S. 836 (1977).

CONCLUSION

An agency may not retroactively reinterpret ambiguous regulations to the substantial detriment of individuals and businesses. TECA's affirmance of such agency decisions violates fundamental principles of due process. The Chamber respectfully urges this Court to grant this Petition to protect Exxon's fundamental rights, and to insure that DOE's administration of petroleum allocation and price control regulations follows well-established administrative standards and remains subject to effective judicial oversight.

Respectfully submitted,

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